

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,
vs.
JOSE ISRAEL MANZO-FLORES,
Defendant.

No. CR-12-6004-LRS
(CV-14-5016-LRS)

**ORDER DENYING
§2255 MOTION**

BEFORE THE COURT is Defendant's "Motion to Vacate, Set Aside, Or Correct Sentence Pursuant to Title 28 U.S.C.A. §2255" (ECF No. 46).

The court conducts an initial review of a §2255 motion. The initial standard of review for motions under §2255 is whether:

[I]t plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court

Rule 4(b), **Rules Governing Proceedings in the United States District Courts under Section 2255 of Title 28, United States Code**. This initial review is conducted prior to the court ordering the United States Attorney to file an answer. Based on the court's initial review of Defendant's motion, it will not direct that an answer be filed by the United States Attorney and the court denies Defendant's motion.

I. BACKGROUND

On April 25, 2012, Defendant pled guilty to an Indictment charging him with being an Alien In The United States After Deportation, 8 U.S.C. §1326. He

**ORDER DENYING
§2255 MOTION-**

1 was sentenced on the same date to a term of imprisonment of 46 months and to a
2 three year term of supervised release. (ECF No. 32). Defendant appealed his
3 sentence to the Ninth Circuit Court of Appeals which, on January 27, 2014,
4 dismissed the appeal. (ECF No. 45). The circuit found the Defendant had waived
5 his right to appeal. The circuit's mandate was filed on February 21, 2014. (ECF
6 No. 47).

7 Defendant contends his guilty plea was not knowingly and voluntarily given
8 because: 1) his counsel at the trial court level failed to advise him of his
9 constitutional rights; 2) failed to object to a 16 level sentence guideline
10 enhancement for an aggravated felony conviction; 3) failed to argue that at his
11 removal proceedings, Defendant was not advised in Spanish of his right to counsel
12 and right to appeal, and therefore, there was not a valid removal order which is a
13 predicate to a conviction under 8 U.S.C. §1326; and 4) failed to file a timely notice
14 of appeal.

15 16 **II. DISCUSSION**

17 Defendant must prove: (1) counsel's performance was deficient, and (2) he
18 was prejudiced by such deficiency. *Strickland v. Washington*, 466 U.S. 668, 687,
19 104 S.Ct. 2052 (1984). As to the first prong, there is a strong presumption
20 counsel's performance was sufficiently effective. *Id.* at 689. Defendant must
21 show his counsel's performance was "outside the wide range of professionally
22 competent assistance." *Id.* at 690. As to the second prong, Defendant must
23 demonstrate a reasonable probability that, but for counsel's errors, the result of the
24 proceeding would have been different (i.e., a guilty plea would not have been
25 entered). A "reasonable probability" is a "probability sufficient to undermine
26 confidence in the proceedings. *Id.* at 694.

27 A guilty plea must be a knowing and intelligent act performed with
28 sufficient awareness of the relevant circumstances and likely consequences. In

1 order for a criminal defendant to make an intelligent assessment of the relative
2 advantages of pleading guilty, it is incumbent upon counsel to provide her client
3 with necessary and accurate information. A mere inaccurate prediction, standing
4 alone, will not constitute ineffective assistance, but “gross mischaracterization” of
5 the likely outcome presented by a case, along with “erroneous advice” falls below
6 the level of competence required of defense attorneys. *Iaea v. Sunn*, 800 F.2d 861,
7 865 (9th Cir. 1986).

8 At the change of plea and sentencing hearing, the Defendant, under oath,
9 acknowledged signing the Plea Agreement after it was read and explained to him
10 in Spanish. (ECF No.41 at p. 7). Paragraph 4 of the Plea Agreement (ECF No.
11 31) lists the constitutional rights the Defendant waived by pleading guilty. Under
12 oath at the change of plea and sentencing hearing, Defendant confirmed he
13 understood he was waiving these constitutional rights, including his right to a jury
14 trial before 12 persons. (ECF No. 41 at pp. 8-9; 14-15). He acknowledged he had
15 not been forced into entering a guilty plea. (*Id.* at pp. 14-15). Under oath at the
16 change of plea and sentencing hearing, Defendant acknowledged he was satisfied
17 with this attorney’s counsel, representation and advice, and she had satisfactorily
18 answered all of his questions concerning the terms and conditions of the Plea
19 Agreement. (ECF No. 41 at p. 7).

20 Paragraph 15 of the Plea Agreement recites that in consideration of the
21 government’s recommendations and the various waivers by Defendant, “both
22 parties waive any right to appeal this conviction and the sentence imposed by the
23 court in this case.” Furthermore, the Defendant waived “any right to collaterally
24 attack this conviction and sentence under 28 U.S.C. § 2255, or any other collateral
25 attack (except for ineffective assistance of counsel based on facts discovered after
26 the plea and sentencing). In his § 2255 motion, Defendant offers no explanation
27 of how any of his asserted grounds for relief are “based on facts discovered after
28 the plea and sentencing.” In the absence of such a showing, the court must

**ORDER DENYING
§2255 MOTION-**

1 presume Defendant's motion is one he waived by the terms of the Plea Agreement
2 and that the court may not consider it.

3 Even assuming otherwise, the conclusory allegations contained in
4 Defendant's motion are insufficient to raise any legitimate question that his
5 counsel's performance was deficient or prejudiced him. Contrary to Defendant's
6 assertion, the Pre-Sentence Investigation Report (PSIR) specifically identified the
7 felony convictions supporting the 16 level enhancement under the sentencing
8 guidelines. (ECF No. 20 at Paragraphs 3, 47-55). These convictions
9 unquestionably constitute a "crime of violence" as defined in Application Note
10 1.(B)(iii) to U.S.S.G. § 2L1.2. Moreover, these categorically qualified as
11 "aggravated" felonies at the time the Defendant was removed from the United
12 States in 2004, and therefore, provide no basis for questioning the validity of the
13 removal order on procedural due process grounds. See *United States v. Vidal-*
14 *Mendoza*, 705 F.3d 1012, 1019-1021 (9th Cir. 2013) and *United States v. Gomez*,
15 732 F.3d 971, 983-87 (9th Cir. 2013). Defendant's "aggravated felony"
16 convictions precluded virtually all forms of relief from removal.

17 Although Paragraph 15 of the Plea Agreement precluded Defendant from
18 filing a direct appeal, he filed one nonetheless in a *pro se* capacity challenging his
19 sentence. (ECF No. 35). Pursuant to an order from the Ninth Circuit Court of
20 Appeals (ECF No. 39), the undersigned appointed counsel for the Defendant on
21 direct appeal (ECF No. 40). Appointed counsel subsequently advised the circuit
22 that there were no grounds for relief on appeal and asked to withdraw. The motion
23 to withdraw was granted by the circuit. The circuit found Defendant had waived
24 his right to appeal his sentence and that its independent review of the record
25 disclosed no arguable issue as to the validity of the waiver. Therefore, the circuit
26 dismissed the appeal. (ECF No. 45). In light of the foregoing, the failure of trial
27 court counsel to file a notice of appeal was not deficient and clearly, Defendant
28 was not prejudiced because he *pro se* pursued an appeal and was appointed

ORDER DENYING
§2255 MOTION-

1 counsel on appeal.

2
3 **III. CONCLUSION**

4 It "plainly" appears from the face of the §2255 motion and the prior
5 proceedings in the case that Defendant is not entitled to relief. Therefore, it is not
6 necessary to direct the United States to file an answer to the motion. Defendant's
7 "Motion to Vacate, Set Aside, Or Correct Sentence Pursuant to Title 28 U.S.C.A.
8 §2255" (ECF No. 46) is **DENIED**.

9 **IT IS SO ORDERED.** The District Court Executive is directed to file this
10 Order and provide copies to Defendant and to counsel for the United States.

11 **DATED** this 25th day of March, 2014.

12
13 *s/Lonny R. Suko*

14

LONNY R. SUKO
15 Senior United States District Judge